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10/045,803	01/12/2002	Philip Connolly	7287	3678
7590	01/14/2008		EXAMINER	
Paul M. Denk 763 South New Ballas Road St. Louis, MO 63141			CORBIN, ARTHUR L	
			ART UNIT	PAPER NUMBER
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

MAILED

JAN 14 2008

GROUP 1700

Application Number: 10/045,803
Filing Date: January 12, 2002
Appellant(s): CONNOLLY, PHILIP

Paul Denk
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed November 23, 2007 appealing from the Office action mailed October 7, 2003.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: Claims 1-3, 7, 8 and 10 also stand rejected under 35 U.S.C. 112, second paragraph.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

6,200,609	MEISTER ET AL	3-2001
3,793,465	BOHREN	2-1974
2,127,524	KRONBERG	8-1938
5,356,640	JAMESON ET AL	10-1994
5,232,720	NIELSEN	8-1993
5,098,721	KOSIKOWSKI ET AL	3-1992

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-3, 7, 8 and 10 stand rejected under 35 U.S.C. 112, second paragraph as being indefinite. The amount of protein administered in the claims is dependent upon the amount of "total daily consumption of protein by the subject", as well as the amount of protein contained in the "combination of milk protein concentrates and probiotic bacteria." None of the three amounts are provided. Yet, in order for one skilled in the art to determine the metes and bounds of the claimed invention, all three must be known. Even if a total amount of protein were provided in the claims regarding that contributed by the milk protein concentrates and the bacteria, this still would not provide the amount to be "administered" (which is what is actually claimed) as a percentage of the "total daily consumption of protein by the subject", since the total daily consumption is variable with each individual and indeterminable from the claims.

Claims 1-3, 7, 8 and 10 also stand rejected under 35 U.S.C. 103(a) as being obvious over Meister et al. Meister et al discloses a process for producing a "dehydrated food composition containing live probiotic lactic acid bacteria." Basically, the reference utilizes concentrated skim milk and cultures of various probiotic lactic acid

bacteria (see especially column 2), to co-spray the two components to form a combined powder containing the two. Meister et al's product pertains to a milk protein concentrate and "a culture of one or more species of probiotic lactic acid bacteria" (col. 2, ln 50-51), wherein the recited bacteria includes *Bifidobacterium longum*, *Streptococcus thermophilus*, and *Lactobacillus delbrueckii* subsp. *bulgaricus*, also known simply as *Lactobacillus bulgaricus*. It would have been obvious for any individual to consume the food composition of the primary reference, whether by itself or as part of another food product, simply depending upon an individual's desires and needs. Finding the optimum total daily consumption of protein needed by an individual as well as the optimum protein content and bacteria content of the composition would require nothing more than routine experimentation by one reasonably skilled in this art.

Claims 1, 2, 7 and 10 further stand rejected under 35 U.S.C. 103(a) as being obvious over Bohren. Bohren discloses a method and product similar to Meister et al above, regarding a lactic-acid bacteria-containing powdered milk product. Bohren specifically discloses the use of *Streptococcus thermophilus* and *Lactobacillus bulgaricus*. Appellant is referred to the last two sentences in the immediately preceding paragraph.

Claim 1 also stands rejected under 35 U.S.C. 103(a) as being obvious over any one of Kronberg, Jameson, Nielsen or Kosikowski et al. Each of these patents discloses a product including milk protein concentrate and probiotic bacteria. Appellant is referred to the last two sentences in the aforesaid 35 U.S.C. 103(a) rejection of claims 1-3, 7, 8 and 10.

(10) Response to Argument

Appellant's remarks regarding Bohren on pages 10-11 of the brief are without merit. As set forth in the rejection based upon Bohren, finding the optimum specific

consumption levels depends upon the individual user of the food composition and requires nothing more than routine experimentation by one reasonably skilled in this art. Any additional components used in the composition of Bohren, such as an acid compound coated in an edible fat with an emulsifier, as mentioned by appellant on page 10, are not precluded by appellant's claims. The intent of consuming appellant's product, as set forth in the preamble of claim 10, would naturally result from consuming the food composition disclosed in Bohren, which includes the same components claimed by appellant.

Appellant's contention with regard to Kronberg, and the patents used alternatively therewith, that the claimed invention is distinct therefrom, as discussed on page 12 of the brief, is not convincing since each of these patents discloses a composition substantially equivalent to that claimed including the major and minor parts of the milk powder in Kronberg referred to by appellant.

Lastly, on page 14 of the brief, appellant recognizes the spray dried milk powder of Meister et al, but argues that it is prepared in a different manner than used by appellant to make the claimed product. However, appellant's claims are limited to a method of using said product rather than a method of making same. As a result, appellant's line of argument in this regard is irrelevant and entitled to no weight.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

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Art Unit: 1794

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Respectfully submitted,

Arthur L. Corbin



Conferees:

Milton Cano



Romulo Delmendo


Romulo Delmendo
Appeal Conference